
SUBSTITUTE SENATE BILL 5406

State of Washington

60th Legislature

2007 Regular Session

By Senate Committee on Government Operations & Elections (originally sponsored by Senators Kline, Fairley and Fraser)

READ FIRST TIME 02/27/07.

1 AN ACT Relating to state employee whistleblower protection; and
2 amending RCW 42.40.020 and 42.40.040.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 42.40.020 and 1999 c 361 s 1 are each amended to read
5 as follows:

6 As used in this chapter, the terms defined in this section shall
7 have the meanings indicated unless the context clearly requires
8 otherwise.

9 (1) "Abuse of authority" means: Use of power and authority in a
10 manner that is intimidating, coercive, or demeaning; willful
11 malfeasance; or willful omission to perform a duty that adversely
12 affects the rights of another person and results in improper personal
13 gain or advantage.

14 (2) "Auditor" means the office of the state auditor.

15 ((+2)) (3) "Employee" means any individual employed or holding
16 office in any department or agency of state government.

17 ((+3)) (4) "Good faith" means there is a reasonable basis in fact
18 for the belief or communication and the employee has made a reasonable

1 attempt to ascertain the correctness of the belief or communication.
2 "Good faith" is lacking when the employee knows or reasonably ought to
3 know that the report is malicious, false, or frivolous.

4 ~~((+4))~~ (5) "Gross mismanagement" means the arbitrary or capricious
5 exercise of management responsibilities in a manner grossly deviating
6 from the standard of care or competence that a reasonable person would
7 observe in the same situation.

8 (6) "Gross waste of funds" means to spend or use funds or to allow
9 funds to be used without valuable result in a manner grossly deviating
10 from the standard of care or competence that a reasonable person would
11 observe in the same situation.

12 ~~((+5))~~ (7)(a) "Improper governmental action" means any action by
13 an employee undertaken in the performance of the employee's official
14 duties:

15 (i) Which is ~~((+a))~~ a gross waste of public funds or resources as
16 defined in this section;

17 (ii) Which is in violation of federal or state law or rule, if the
18 violation is not merely technical or of a minimum nature; ~~((+e))~~

19 (iii) Which is of substantial and specific danger to the public
20 health or safety;

21 (iv) Which is gross mismanagement as defined in this section;

22 (v) Which is an abuse of authority as defined in this section; or

23 (vi) Which prevents the dissemination of scientific opinion or
24 alters technical findings without scientifically valid justification.

25 This provision is not meant to preclude the discretion of agency
26 management to adopt a particular scientific opinion or technical
27 finding from among differing opinions or findings to the exclusion of
28 other scientific opinions or technical findings.

29 (b) "Improper governmental action" does not include personnel
30 actions, for which other remedies exist, including but not limited to
31 employee grievances, complaints, appointments, promotions, transfers,
32 assignments, reassignments, reinstatements, restorations,
33 reemployments, performance evaluations, reductions in pay, dismissals,
34 suspensions, demotions, violations of the state civil service law,
35 alleged labor agreement violations, reprimands, claims of
36 discriminatory treatment, or any action which may be taken under
37 chapter 41.06 RCW, or other disciplinary action except as provided in
38 RCW 42.40.030.

1 (~~(6)~~) (8) "Public body" means the employee's supervisor, law
2 enforcement, the attorney general, legislative and executive branches
3 of government, a court of law, and other governmental authorities.

4 (9) "Substantial and specific danger" means a risk of serious
5 injury, illness, peril, or loss, to which the exposure of the public is
6 a gross deviation from the standard of care or competence which a
7 reasonable person would observe in the same situation.

8 (~~(7)~~) (10) "Use of official authority or influence" includes
9 taking, directing others to take, recommending, processing, or
10 approving any personnel action such as an appointment, promotion,
11 transfer, assignment, reassignment, reinstatement, restoration,
12 reemployment, performance evaluation, or any adverse action under
13 chapter 41.06 RCW, or other disciplinary action.

14 (~~(8)~~) (11) "Whistleblower" means an employee who in good faith
15 reports alleged improper governmental action to the auditor, initiating
16 an investigation under RCW 42.40.040. For purposes of the provisions
17 of this chapter and chapter 49.60 RCW relating to reprisals and
18 retaliatory action, the term "whistleblower" also means: (a) An
19 employee who in good faith provides information to the auditor in
20 connection with an investigation under RCW 42.40.040 and an employee
21 who is believed to have reported asserted improper governmental action
22 to the auditor or to have provided information to the auditor in
23 connection with an investigation under RCW 42.40.040 but who, in fact,
24 has not reported such action or provided such information; or (b) an
25 employee who in good faith identifies rules warranting review or
26 provides information to a public body including the rules review
27 committee, and an employee who is believed to have identified rules
28 warranting review or provided information to the rules review committee
29 but who, in fact, has not done so.

30 **Sec. 2.** RCW 42.40.040 and 1999 c 361 s 3 are each amended to read
31 as follows:

32 (1)(a) In order to be investigated, an assertion of improper
33 governmental action must be provided to the auditor within one year
34 after the occurrence of the asserted improper governmental action.

35 (b) The auditor has the authority to determine whether to
36 investigate any assertions received. In determining whether to conduct
37 either a preliminary or further investigation, the auditor shall

1 consider factors including, but not limited to: The nature and quality
2 of evidence and the existence of relevant laws and rules; whether the
3 action was isolated or systematic; the history of previous assertions
4 regarding the same subject or subjects or subject matter; whether other
5 avenues are available for addressing the matter; whether the matter has
6 already been investigated or is in litigation; the seriousness or
7 significance of the asserted improper governmental action; and the cost
8 and benefit of the investigation. The auditor has the sole discretion
9 to determine the priority and weight given to these and other relevant
10 factors and to decide whether a matter is to be investigated. The
11 auditor shall document the factors considered and the analysis applied.

12 (c) The auditor also has the authority to investigate assertions of
13 improper governmental actions as part of an audit conducted under
14 chapter 43.09 RCW. The auditor shall document the reasons for handling
15 the matter as part of such an audit.

16 (d) The auditor also has the authority to investigate reports of
17 improper governmental activities made by whistleblowers to any public
18 body pursuant to RCW 42.40.050. Any public body receiving that report
19 must submit a record of that report to the auditor within five business
20 days of receiving it.

21 (2) Subject to subsection (5)(c) of this section, the identity of
22 a whistleblower is confidential at all times unless the whistleblower
23 consents to disclosure by written waiver or by acknowledging his or her
24 identity in a claim against the state for retaliation.

25 (3) Upon receiving specific information that an employee has
26 engaged in improper governmental action, the auditor shall, within five
27 working days of receipt of the information, mail written
28 acknowledgement to the whistleblower at the address provided stating
29 whether a preliminary investigation will be conducted. For a period
30 not to exceed thirty working days from receipt of the assertion, the
31 auditor shall conduct such preliminary investigation of the matter as
32 the auditor deems appropriate.

33 (4) In addition to the authority under subsection (3) of this
34 section, the auditor may, on its own initiative, investigate incidents
35 of improper state governmental action.

36 (5)(a) If it appears to the auditor, upon completion of the
37 preliminary investigation, that the matter is so unsubstantiated that

1 no further investigation, prosecution, or administrative action is
2 warranted, the auditor shall so notify the whistleblower.

3 (b) The written notification shall contain a summary of the
4 information received and of the results of the preliminary
5 investigation with regard to each assertion of improper governmental
6 action.

7 (c) In any case to which this section applies, the identity of the
8 whistleblower shall be kept confidential unless the auditor determines
9 that the information has been provided other than in good faith.

10 (d) With the agency's consent, the auditor may forward the
11 assertions to an appropriate agency to investigate and report back to
12 the auditor no later than sixty working days after the assertions are
13 received from the auditor. The auditor is entitled to all
14 investigative records resulting from such a referral. All procedural
15 and confidentiality provisions of this chapter apply to investigations
16 conducted under this subsection. The auditor shall document the
17 reasons the assertions were referred.

18 (6) During the preliminary investigation, the auditor shall provide
19 written notification of the nature of the assertions to the subject or
20 subjects of the investigation and the agency head. The notification
21 shall include the relevant facts and laws known at the time and the
22 procedure for the subject or subjects of the investigation and the
23 agency head to respond to the assertions and information obtained
24 during the investigation. This notification does not limit the auditor
25 from considering additional facts or laws which become known during
26 further investigation.

27 (7)(a) If it appears to the auditor after completion of the
28 preliminary investigation that further investigation, prosecution, or
29 administrative action is warranted, the auditor shall so notify the
30 whistleblower, the subject or subjects of the investigation, and the
31 agency head and either conduct a further investigation or issue a
32 report under subsection (10) of this section.

33 (b) If the preliminary investigation resulted from an anonymous
34 assertion, a decision to conduct further investigation shall be subject
35 to review by a three-person panel convened as necessary by the auditor
36 prior to the commencement of any additional investigation. The panel
37 shall include a state auditor representative knowledgeable of the
38 subject agency operations, a citizen volunteer, and a representative of

1 the attorney general's office. This group shall be briefed on the
2 preliminary investigation and shall recommend whether the auditor
3 should proceed with further investigation.

4 (c) If further investigation is to occur, the auditor shall provide
5 written notification of the nature of the assertions to the subject or
6 subjects of the investigation and the agency head. The notification
7 shall include the relevant facts known at the time and the procedure to
8 be used by the subject or subjects of the investigation and the agency
9 head to respond to the assertions and information obtained during the
10 investigation.

11 (8) Within sixty working days after the preliminary investigation
12 period in subsection (3) of this section, the auditor shall complete
13 the investigation and report its findings to the whistleblower unless
14 written justification for the delay is furnished to the whistleblower,
15 agency head, and subject or subjects of the investigation. In all such
16 cases, the report of the auditor's investigation and findings shall be
17 sent to the whistleblower within one year after the information was
18 filed under subsection (3) of this section.

19 (9)(a) At any stage of an investigation under this section the
20 auditor may require by subpoena the attendance and testimony of
21 witnesses and the production of documentary or other evidence relating
22 to the investigation at any designated place in the state. The auditor
23 may issue subpoenas, administer oaths, examine witnesses, and receive
24 evidence. In the case of contumacy or failure to obey a subpoena, the
25 superior court for the county in which the person to whom the subpoena
26 is addressed resides or is served may issue an order requiring the
27 person to appear at any designated place to testify or to produce
28 documentary or other evidence. Any failure to obey the order of the
29 court may be punished by the court as a contempt thereof.

30 (b) The auditor may order the taking of depositions at any stage of
31 a proceeding or investigation under this chapter. Depositions shall be
32 taken before an individual designated by the auditor and having the
33 power to administer oaths. Testimony shall be reduced to writing by or
34 under the direction of the individual taking the deposition and shall
35 be subscribed by the deponent.

36 (c) Agencies shall cooperate fully in the investigation and shall
37 take appropriate action to preclude the destruction of any evidence
38 during the course of the investigation.

1 (d) During the investigation the auditor shall interview each
2 subject of the investigation. If it is determined there is reasonable
3 cause to believe improper governmental action has occurred, the subject
4 or subjects and the agency head shall be given fifteen working days to
5 respond to the assertions prior to the issuance of the final report.

6 (10)(a) If the auditor determines there is reasonable cause to
7 believe an employee has engaged in improper governmental action, the
8 auditor shall report the nature and details of the activity to:

9 (i) The subject or subjects of the investigation and the head of
10 the employing agency; and

11 (ii) If appropriate, the attorney general or such other authority
12 as the auditor determines appropriate.

13 (b) The auditor has no enforcement power except that in any case in
14 which the auditor submits an investigative report containing reasonable
15 cause determinations to the agency, the agency shall send its plan for
16 resolution to the auditor within fifteen working days of having
17 received the report. The agency is encouraged to consult with the
18 subject or subjects of the investigation in establishing the resolution
19 plan. The auditor may require periodic reports of agency action until
20 all resolution has occurred. If the auditor determines that
21 appropriate action has not been taken, the auditor shall report the
22 determination to the governor and to the legislature and may include
23 this determination in the agency audit under chapter 43.09 RCW.

24 (11) Once the auditor concludes that appropriate action has been
25 taken to resolve the matter, the auditor shall so notify the
26 whistleblower, the agency head, and the subject or subjects of the
27 investigation. If the resolution takes more than one year, the auditor
28 shall provide annual notification of its status to the whistleblower,
29 agency head, and subject or subjects of the investigation.

30 (12) This section does not limit any authority conferred upon the
31 attorney general or any other agency of government to investigate any
32 matter.

--- END ---